(4)

PROCEEDINGS AND ORDERS DATE: 060385

CASE NBR 84-1-06249 CFY
SHORT TITLE Wesley, Oscar W. DOCKETED: Feb 1 1985
VERSUS United States

Date	Proceedings and Orders
Feb 1 1985	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Mar 4 1985	Order extending time to file response to petition until April 3, 1985.
Mar 29 1985	Order further extending time to file response to petition until April 29, 1985.
Apr 30 1985	Brief of respondent United States in opposition filed.
	VIDED.
May 2 1985	DISTRIBUTED. May 16, 1985
May 17 1985	REDISTRIBUTED. May 23, 1985
May 28 1985	Petition DENIED. Dissenting opinion by Justice White with whom Justice Brennan and Justice Marshall join. (Detached opinion.)

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EDITOR'S NOTE

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ORIGINAL

NO. 84-6249

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

OSCAR WESLEY

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

D'AMICO, CURET & DAMPF
263 Riverside Mall, Suite 610
Baton Rouge, Louisiana 70801
(504) 387-2273

By: J. Michael McDonald

Court Appointed Attorney
For Petitioner

26pp

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

NUMBER: _____

OSCAR WESLEY, Petitioner

VERSUS

UNITED STATES OF AMERICA, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petition of Oscar W. Wesley, through undersigned counsel, (APPOINTED PURSUANT TO CRIMINAL JUSTICE ACT, 1964, asks leave of court to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to proceed in forma pauperis in both the United States District Court and the United States Court of Appeal and attaches a copy of his affidavit filed with the Court of Appeal hereto. Since executing this affidavit he has been confined in federal custody and his financial status has not changed.

By Attorneys:

D'AMICO, CURET & DAMPF

By: J. Michael McDonald

J. Michael McDonald
263 Riverside Mall, Suite 610
Baton Rouge, LA 70801
(504) 387-2273

ORDER

IT IS ORDERED that petitioner, Oscar Wesley, be allowed to proceed in this matter in forma pauperis without prepayment of costs and filing fees.

_____
JUSTICE, UNITED STATES SUPREME COURT

TABLE OF CONTENTS

STATE OF LOUISIANA

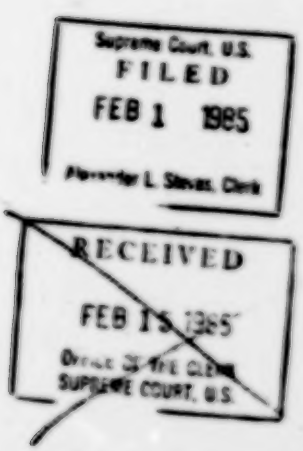
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned Notary, personally came and appeared J. Michael McDonald, Attorney at Law, who did depose and say that he has been appointed by the United States Middle District Court for the State of Louisiana and the United States Fifth Circuit Court of Appeal to represent Oscar Wesley at trial and on appeal, under the Criminal Justice Act, due to the indigent status of the defendants.

J. Michael McDonald

SWORN TO AND SUBSCRIBED BEFORE ME this 29th day of January, 1985.

NOTARY PUBLIC



QUESTIONS PRESENTED FOR REVIEW

1. Whether Congress, by simultaneously enacting 18 U. S. C. 1512 and amending 18 U. S. C. § 1503 to delete all references to witnesses therein, intended that threats and intimidation directed at witnesses could henceforth be prosecuted only udner 18 U. S. C. § 1512 and not under 18 U. S. C. § 1503.

2. Whether petitioner's conviction under 18 U. S. C. 1512 is supported by competent and legally sufficient evidence particularly since his co-defendant was acquitted of this charge.

3. Whether petitioner's conviction for a violation of 18 U. S. C. § 1202 (Appendix) is supported by competent and legally sufficient evidence.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. _____

OSCAR WESLEY

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Oscar Wesley, respectfully prays that a writ of certiorari issue to review the correctness of the judgment of the United States Court of Appeals for the Fifth Circuit entered on December 6, 1984.

OPINION BELOW

The United States Court of Appeals for the Fifth Circuit entered its decision affirming petitioner's conviction under 18 U. S. C. § 1503, § 1512, and § 1202 (Appendix) on December 6, 1984. A copy of the decision is attached as Appendix A.

JURISDICTION

On December 6, 1984, the United States Court of Appeals for the Fifth Circuit entered a judgment which affirmed petitioner's conviction under 18 U. S. C. § 1503, § 1512, and § 1202 (Appendix), (Appendix A). The jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28, United States Code, Section 1254(1).

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Oscar Wesley was indicted by a federal grand jury for a violation of 18 U.S.C. 1202(a)(1) (Appendix) as a convicted felon who was in possession of a firearm. The predicate felony was a felony theft conviction in 1969 in Louisiana State Court. He was charged with pawning a .38 caliber revolver at a Baton Rouge pawn shop on January 20, 1982.

He was arrested on October 24, 1983, and confined to the Baton Rouge Jail until October 31, 1983, when he was released on bond. On November 3, 1983, he was arrested again. This time a superceding indictment charged him with the original offense plus three other counts: (1) Conspiracy with Velma Cooper to intimidate a witness, procure a witness to commit perjury, and obstruct justice in violation of 18 U.S.C. 371; (2) influencing the due administration of justce in violation of 18 U.S.C. 1503 and 18 U.S.C. 2; and (3) threatening a witness in violation of 18 U.S.C. 1512(a)(1) and 18 U.S.C. 2.

The factual basis for the additional counts stemmed from an incident on October 24, 1983, the day the defendant was first arrested and while he was incarcerated. On that date, Velma Cooper went to visit Cheryl Berry, Oscar Wesley's ex-stepdaughter, for assistance in aiding Oscar. The indictment charged both Oscar and Velma with threatening the potential witness, conspiring to threaten her, and obstruction of justice.

Oscar Wesley and Velma Cooper were tried jointly before a jury on February 13 and 14, 1984. Both were acquitted on the conspiracy count (Count II). Velma was acquiteed on the charge of threatening a witness (Count IV - 18 U.S.C. § 1512) but convicted of obstruction of Justice (Count III - 18 U.S.C. § 1503). Oscar Wesley was convicted of the gun charge (Count I - 18 U.S.C. § 1202 (Appendix)), the obstruction of justice charge (Count III

along with Velma Cooper - 18 U.S.C. § 1503) and the charge of threatening a witness (Count IV - 18 U.S.C. § 1512) even though Velma Cooper was acquitted of that count. Oscar Wesley was sentenced to two years on Count I and five consecutive years on Count III. Imposition of sentence of Count IV was suspended and he was placed on five years probation upon his release from confinement.

Thereafter, Oscar Wesley appealed his conviction to the United States Court of Appeals for the Fifth Circuit which was affirmed on December 6, 1984. United States v. Wesley, 748 F.2d 962 (C.A. 5th Cir. 1984).

ARGUMENT

I. Oscar Wesley was charged wth violating 18 U.S.C. §1503 (Count III) and 18 U.S.C. § 1512 (Count IV) and convicted of both. This amounts to a violation of the Fifth Amendment to the United States Constitution as he was convicted twice for the same offense. Secondly, Congress has deleted any acts affecting witnesses from 18 U.S.C. § 1503 and any such offense is now only punishable under 18 U. S. C. § 1512.

In 1982 the Victim and Witness Protection Act, Pub. L. No. 97-291 (18 U.S.C. § 1512) was enacted by congress. It revamped the old act (§1503) by shoring up some of its deficiencies and strengthening its application. In amending §1503 and enacting § 1512, Congress deleted all references to witnesses in the former and placed them in the latter.

18 U S.C. § 1503 has two separate clauses. The first expressly prohibits certain proscribed conduct directed at a specified class or group of individuals. The second clause is the "omnibus" clause and is directed toward corrupt practices obstructing the "due administration of justice." Prior to the enactment of 18 U.S.C. § 1512, it was not uncommon for the government to charge an offense under the omnibus clause for specific acts against a witness. United States v. Vesich, 724 F. 2d 451 (5th Cir. 1984); United States v. Chandler, 604 F. 2d 972 (5th Cir. 1979); United States v. Bradwell, 388 F. 2d 619 (2nd Cir. 1968); United States v. Partin, 552 F. 2d 621 (5th Cir. 1971). Then, the government had the option of proceeding under either the specific express clause or the omnibus clause if the act was directed toward a witness. They could not, however, proceed under both. A conviction of either carried the same penalty because it was a violation of the same statute.

With the enactment of 18 U.S.C. §1512 the situation has changed. The government must either elect which statute to invoke

or they must proceed solely under 18 U.S.C. § 1512 if the conduct is directed toward a witness.

Under the first rationale, they must elect because of the duplicity of the offenses. Any action directed towards jurors, magistrates, commissioners or witnesses (prior to 1982) could be prosecuted either under the special provision or the omnibus clause. If the action was directed toward any of the exclusive listing of people, it would also violate the omnibus clause. Since the enactment of 18 U.S.C. § 1512 any action directed toward a witness would be violative of the omnibus clause. The reverse, however, is not necessarily true. The omnibus clause could be violated without affecting any of the exclusive listing of personnel in either states. United States v. Brown, 688 F.2d 599 (9th Cir. 1982); United States v. Howard, 569 F.2d 1331 (5th Cir. 1978). But, the important fact is that the same conduct violates both provisions and the proof in each is the same. There is no element which must be proven to satisfy 18 U.S.C. §1512 which does not also satisfy 18 U.S.C. §1503. Blockburger v. United States, 52 S. Ct. 180 (1932). This test was reaffirmed in Albernaz v. United States, 101 S. Ct. 1137 (1981) and explained in Whalen v United States, 100 S. Ct. 1432 (1980). The defendant was convicted of rape and felony murder, being the killing of a person while perpetrating the same rape committed in the District of Columbia in violation of statutes enacted by Congress. The Court held "if Congress has not authorized cumulative punishments for rape and for an unintentional killing in the course of the rape, contrary to what the Court of Appeal believed, the petitioner has been impermissably sentenced." Whalen v. United States, supra at 1439.

The same rationale is true in the case against Oscar Wesley. If the threat against the witness is proven, then a violation of obstruction of justice is also proven. He cannot be charged with both.

Secondly, the government is prohibited from proceeding under the omnibus clause of 18 U.S.C. § 1503 because of the enactment of 18 U.S.C. § 1512. By deleting all references in the prior statute and creating a new, separate statute for the protection of witnesses it is obvious that Congress intended for 18 U.S.C. § 1512 to be the exclusive statute government conduct directed toward witnesses.

Because the statute has been in effect for a relatively short period of time, there is little jurisprudence on the matter. However, recently the Second Circuit reached the same conclusion, that 18 U.S.C. § 1512 is the sole, exclusive remedy for acts directed toward witnesses. United States v. Hernandez, 730 F.2d 895 (2nd Cir. 1984). The defendant, Lorenzo, had been charged with various offenses among which were a violation of 18 U.S.C. § 1503 (Count 8) and violation of 18 U.S.C. § 1512 (Count 9). His conduct was the same, but he was charged under both statutes. He appealed his conviction under § 1503 alleging his act against a witness was no longer within the proscriptions of that statute. The court in explaining the history of the statutes and the intent of Congress in enacting the victim-witness Protection Act, ruled in favor of the defendant and said:

> "Viewing the actions of Congress and the plain language of both statutes realistically, we agree with Lorenzo and conclude that Congress affirmatively intended to remove witnesses entirely from the scope of § 1503." supra at 898.

In concluding, the court states, "...by enacting the Victim and Witness Protection Act in 1982, Congress intended that intimidation and harassment of witnesses should henceforth be prosecuted under § 1512 and no longer fall under § 1503." supra at 899.

The Fifth Circuit, in affirming Oscar Wesley's conviction, rejected the ruling by the Second Circuit and, thus, has created a conflict between the circuits. Had Oscar Wesley resided within the jurisdiction of the Second Circuit his conviction would have been reversed.

The Court cites its decision in United States v. Vesich, 724 F. 2d 451 (C. A. 5th Cir. 1984) and a district court case from New York to support its ruling. United States v. Beatty 587 F. Supp. 1325 (E.D. N.Y. 1984).

Vesich, however, involves acts committed prior to the enactment of § 1512 even though the decision was rendered after its enactment. The Court concluded that the advising of a potential witness to testify falsely in a judicial proceeding did violate the omnibus clause of § 1503. This might still be true, but now it more appropriately violates § 1512 which was non-existent on January 6, 1982, when Vesich committed his act.

In Beatty, supra, the defendant was charged with violating § 1503 in two ways. First, he gave disguised and misleading handwriting exemplars to the grand jury and, secondly, he was "urging, suggesting, and instructing witnesses to give false and misleading testimony before the Grand Jury". Beatty, supra at 13. The court addresses the intent of § 1512 to cover acts in any manner relating to witnesses and then found itself in a unique situation. The act of giving disquised and misleading handwriting exemplars was found to violate § 1503's omnibus clause. However, the conduct of "urging, suggesting, and instructing" the witness to testify falsely was beyond the language of § 1512. The Court found that the Senate version intended to cover any such action against a witness (Beatty, supra, at 14).

The Court distinguished Hernandez, supra, but did not need to do so. The court concludes:

> "The charge against the defendant of 'urging, suggesting and instructing witnesses to give false and misleading testimony before the Grand Jury' is not one which accuses him of intending to prevent the witness from testifying in an official proceeding. On the contrary, it suggests that he wanted them to testify, and thus corruptly endeavored to influence, obstruct, and impede the due administration of justice." Beatty supra at 16.

The court was concerned with and addressed section (b) of § 1512 which addresses harassment sufficient to dely or prevent a witness from testifying. The Court states:

> "The omission of the general obstruction of justice residual clause from the statute as finally enacted is meaningful in a case such as this where it is not alleged that the witness was forced, threatened or harassed to do or refrain from doing anyting and therefore not in need of protection." Beatty, supra, at 17.

However, this conduct could easily have fit within part (a) of § 1512 rather than part (b). This conduct of "urging, suggesting, and instructing" would, more appropriately, be classified under intimidation or misleading conduct of the type prohibited by § 1512 (a) directed toward influencing the testimony of the witness.

In the present case all of the alleged conduct was directed toward Cheryl Lynn Berry, the prospective witness. In both counts the defendant is charged with intimidation and corruptly influencing the witness. In Count III he is additionally charged with impeding and in Count Iv with physical force and threat thereof and misleading conduct. Velma Cooper made one visit to Cheryl Berry and requested she come to court and testify a certain way or Oscar Wesley would come to see her. That was the only act and it only affected Cheryl Berry, the witness. There were not two acts as in Beatty, supra, - one toward the witness and one toward the administration of justice (handwriting exemplars).

In U. S. v. Wilson, 565 F. Supp. 1416 (S.D. N.Y. 1983). the government chose the proper statutes for the proper charge and proceeded accordingly. Count 6 of the indictment charged violations of § 1503 for threatening to kill two prosecutors. Conversely, counts 7-10 charged violations of § 1512 for threatening witnesses. The court found that the acts directed toward the prosecutors could fit under either the specific or omnibus clause of § 1503. By threatening to kill the prosecutors the defendant was endeavoring to interfere with an officer of

the court and impede the administration of justice (omnibus clause). Wilson, supra, at 1433. The charges alleging threats against witnesses were only pursued under § 1512. This supports the argument made by Oscar Wesley. The acts in Wilson, supra, could have been violative of either clause of §1503 prior to the 1982 amendment. However, now only the acts alleged against the prosecutor fit either category. The conduct directed toward witnesses has its own statute. By proving all the elements for an accusation under § 1512 a violation of the omnibus clause of § 1503 would, of necessity also be proven. However, the intent of Congress is for action directed toward witnesses to be pursued exclusively under § 1512. See United States v. Hernandez, 730 F. 2d 895 (2nd Cir. 1984.) The original Senate version of the act contained an omnibus clause similar to that in § 1503. Senator Heinz, a prime mover of the bill explained that the final adopted version was the House version which deleted the omnibus clause. He states that the reason is it went beyond the legitimate scope of the witness protection idea and would provide for a clearer less duplicitous law. 128 Cong. Rec. § 13063 (daily ed. Oct. 1, 1982) cited in Hernandez, supra, at 899; cited in Beatty, supra, at 15.

The Fifth Circuit recognized that the House version of the bill was enacted as § 1512, but still rejected the analysis in Hernandez, supra. Thus, Congress intended to delete witnesses and any acts of intimidation, harassment, corruptness, or threats toward witnesses from § 1503. Any such conduct was contemplated and envisioned under § 1512. Therefore, the defendant, Oscar Wesley was erroneously prosecuted for a violation of U.S.C. § 1503.

II. Defendant Oscar Wesley was arrested on October 24, 1983, and charged with being a felon in possession of a firearm. He was incarcerated in the Baton Rouge, Louisiana, jail and remained there until a week later. On the date of his arrest the government proved that his girlfriend, Velma Cooper, received a telephone call from him sometime that night. (Tr. 137-138,141). There was no testimony concerning the conversation that took place, other than Velma being told that Oscar had been arrested. Some time later Velma left her house and went to visit Cheryl Berry. Velma's daughter, Debby Stewart, testified that Velma had met Mrs. Berry before and had been to her house.

The only evidence adduced as to what was said and what transpired at the Berry's trailer came from Cheryl and Bill Berry. They both testified that Velma was requesting Cheryl to go to court and tell the federal authorities that several items which had been pawned belonged to her and not to Oscar. (Tr. Billy 148; Cheryl-171) In particular, she requested Cheryl to tell the federal authorities that a pistol belonged to her and not to Oscar.

There are two possible theories upon which Oscar Wesley could be guilty of 18 U.S.C. § 1512, either he was the principal or he aided and abetted its commission. If a threat was made, it was impossible for Oscar Wesley to have made it as he was in jail and had no communication with Cheryl Berry. Thus, he was not the principal to the offense. He, therefore, had to have been an "aider and abettor" under 18 U.S.C. 2.

It is inherent under this theory, however, that the crime be committed. It is also inherent under these circumstances that Velma Cooper be convicted to sustain the conviction of Oscar Wesley. Courts have consistently held that "one cannot be convicted of merely 'aiding and abetting.' One must aid and abet the commission of some substantive offense in order to be punishable as a principal under 18 U.S.C. §2." United States v. Masson,

582 F. 2d 961 (5th Cir. 1978); United States v. McCoy, 539 F. 2d 1050 (5th Cir. 1976) at 1064; United States v. Alvarez, 610 F. 2d 1250 (5th Cir. 1980), rehearing granted and overruled on other grounds at 625 F. 2d 1196; Powers v. United States, 470 F.2d 991 (5th Cir. 1972).

There can be no conviction under this statute without proving that there was a completed crime committed. United States v. Alvarez, supra. The facts, and the verdict in favor of Velma Cooper, clearly show the lack of a crime. There was no threat made. Had there been Velma would have also been convicted. A careful study of the transcript indicates that Cheryl Berry was upset the night that Velma Cooper visited, but not because of any threats. Cheryl told Velma she would not go to the federal authorities and Cheryl relates the following which was told her by Velma:

> "Well, I just only telling you, you know, what Oscar said...and Oscar said if you don't go, that he would be out thre to talk to you." (Tr. 172)

The prosecutor asked her if she considered this a threat and she replied, "Yes, sir, because I didn't even know the lady. And she wound conviced..." (Tr. 172-173). There was no hidden meaning nor inuendo in the words told to Cheryl Berry. She was told Oscar "would talk to her." This simply was not a threat. Bill Berry was present during the conversation and heard no threat. (Tr. 148, 151, 161). After Velma left, his wife did not tell him she had been threatened. She said she was frightened, but elsewhere she states the reasons. A strange lady had come to her house late at night. This was a strange, unusual occurrence for her. (Tr. 180, 184, 190). She was confused and upset by this. The lady was telling her to tell the authorities she owned a pistol; she thought it was illegal to own a pistol (Tr. 197-198, 204).

Cheryl Berry is nineteen years old, has been married to Bill Berry for four years (Tr. 143), and has nerve problems. (Tr. 176). Cheryl Berry was not afraid of Oscar Wesley on October 24, 1983 (Tr. 173-174). Cheryl had a good relationship with Oscar Wesley. She had helped him; he had always been good to her and had never mistreated her. (Tr. 168, 186, 201, 203). She looked up to him as a father (Tr. 201, 203). The conversation with Velma was amicable, cordial, and friendly (Tr. 181). No report of a threat was made to the police or any other authorities. (Tr. 151, 176, 181). Had Agent Russell not contacted Cheryl to verify the story given him by Oscar Wesley, no one would ever have know of the visit by Velma and ensuing conversation. Therefore, the facts clearly show that no threat was made by Velma and therefore, there is none to impute to Oscar Wesley. Cheryl was not threatened; she was frightened and upset. But, this was because of her age, her nervous condition, and the circumstances of the event.

The courts have held that the conviction of a principal is not a prerequisite to the conviction of an aider and abettor, but it must still be proven that an offense was committed. In United States v. Barfield, 447 F 2d 85 (5th Cir. 1971) the defendant was convicted of being an "aider and abettor" but the government failed to prove that the offense was actually committed

Oscar Wesley was incapable of threatening Cheryl Berry because he was incarcerated. No threat was made because the jury acquitted Velma Cooper. This was the same jury, hearing the same evidence, at the same time, at one trial. Not two separate juries, in two separate trials, with co-defendants.

Thus, the acquittal of Velma Cooper should have precluded the conviction of Oscar Wesley.

III. Count I of the indictment charges the defendant with violating Title 18, United States Code, Section 1202(a)(1) (Appendix). The evidence in this matter failed to prove this offense beyond a reasonable doubt.

This offense consists of four elements: (1) Possession of a weapon, (2) which is shown to be a "firearm," (3) which has travelled in interstate commerce, (4) by a convicted felon. The government failed in its burden to prove these essential elements.

There are serious problems with the identification of the "firearm" in this instance, and with the chain of custody of the "firearm" in this instance, and with the chain of custody of the weapon involved. The government elicited testimony from a representative of R. G. Industries that his company began manufacture of a .38 caliber model 31 revolver in 1969. (Tr. 134). He also testified that such a revolver is still manufactured and in 1974 the company began using alpha characters preceding the numerical serial numbers. (Tr. 133) He produced an invoice showing that revolver with serial number Q054616 was shipped in interstate commerce from Miami, Florida, to Forrest, Mississippi on February 12, 1974. (Exh. 9, Tr. 132). This is the same year R. G. Industries began using apha character prefixes on their serial numbers for this model weapon. The company representative was also shown a model 31, .38 caliber pistol with serial number Q093889 and examined it giving his opinion as to its ability to fire a projectile. He states that the gun lacked a firing pin.

The government failed to produce any "firearm" with serial number Q054616 as alleged in the indictment. Mrs. Thane McKinnon testified regarding a pistol that was pawned by Oscar Wesley.

However, she testified that she wrote down the serial number on three separate occasions as 0054616. (Tr. 57) Each time she read the number from the gun and three times wrote down the identical number. She wrote this number on the pawn ticket for pistol number 0054616. In Preparing the police report listing pawned items she ag in wrote down this number, and on the ATF report she did the same.

ATF Agent Kirby Russel testified concerning his tracing a pistol from the pawn shop run by Mrs. McKinnon to a Fred Altman. It was his opinion that the serial number on the gun was Q054616 rather than 0054616. Agent Russell attempted to trace pistol 0054616 and was unable to do so. He also tried to trace pistol Q054616 and was only partially successful. Neither was traceable to the defendant, Oscar Wesley. Agent Russell did not confiscate the pistol in the possession of Fred Altman. Had he done so, the jury could have decided whether it was the weapon indicated in Count I of the indictment. There was no testimony concerning the gun which was pawned relative to its ability to be fired or its inability to be fired. After the suggestion by Agent Russell that the number might be incorrect, Mrs. McKinnon suddenly had a revelation that guns from R. G. Industries begin with a "Q" (Tr. 49) However, she admits that on three separate occasions she saw an "O". After "prompting" by the U. S. Attorney and Agent Russell she concluded that all RG pistols have serial numbers beginning with a "Q" and she had made a mistake. Moments later, however, she identified the serial number on the pistol present in court as beginning with a "D". (Tr. 56).

While the government may have proven that Q054616 travelled in interstate commerce, there was no showing that 0054616 did. There was no showing that either fit the statutory definition of a "firearm." U. S. v. Turner, 565 F. 2d 539 (8th Cir. 1977).

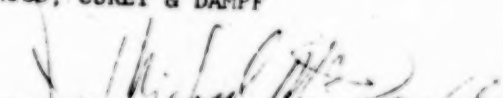
There was no showing that pistol 0054616 was in working condition and a "firearm." There was no proof that it travelled in interstate commerce. The government failed to prove these two essential elements beyond a reasonable doubt. Even if they had, however, the defendant was not charged with any violation concerning a weapon with serial number 0054616. As to the pistol numbered Q054616, there was no showing that it was ever possessed by the defendant. Thus, the government failed to meet its burden beyond a reasonable doubt.

CONCLUSION

Therefore, based on the inadequacy of the evidence against him, the non-uniformity of the interpretation and application of the law by the Second and Fifth Circuits, and the placing of the defendant in jeopardy twice for the same offense, Oscar Wesley respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifty Circuit.

Respectfully submitted,

D'AMICO, CURET & DAMPF

By: 

J. Michael McDonald
263 Riverside Mall, Suite 610
Baton Rouge, LA 70801
(504) 387-2273

Attorney for Oscar Wesley

UNITED STATES of America, Plaintiff-Appellee,

v.

Oscar W. WESLEY and Velma Cooper, Defendants-Appellants.

No. 84-3287.

United States Court of Appeals, Fifth Circuit.

Dec. 6, 1984.

Defendant was convicted in the United States District Court for the Middle District of Louisiana, at Baton Rouge, Frank J. Polozola, J., of possessing a firearm after having been convicted of a felony, influencing the administration of justice, and tampering with a witness, and codefendant was convicted of obstructing the due administration of justice, and they appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that defendant who was alleged to have urged and advised witness to testify falsely was properly charged with both obstruction of justice and with intimidating a witness under another statute.

Affirmed.

1. Obstructing Justice ⇐4

By enacting new statute to address certain kinds of witness intimidation and simultaneously deleting from earlier statute, which prohibits obstruction of the due administration of justice, all references to witnesses, Congress did not intend that threats against witnesses would fall exclusively under the new statute and be exempt from prosecution under the earlier statute; earlier statute remains applicable to obstruction of the administration of justice by attempts to influence witnesses. 18 U.S.C.A. §§ 1503, 1512.

2. Criminal Law ⇐29, 200(1)

Defendant who was charged with urging and advising witness to testify falsely was properly charged with both obstruction of justice and with intimidating witness under another statute, with result of that convictions under both statutes were not multiplicious or violative of double jeopardy clause. 18 U.S.C.A. §§ 1503, 1512, U.S.C.A. Const.Amend. 5.

Appeal from the United States District Court for the Middle District of Louisiana.

Before RUBIN, TATE, and HILL, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge: *

Of the numerous issues raised by the defendants on appeal, only one has precedential value.

Oscar Wesley appeals from his conviction of possessing a firearm after having been convicted of a felony, influencing the due administration of justice, and tampering

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens the legal profession." Pursuant to that rule the Court has determined that the non-precedential portions of this opinion should not be published.

The places at which the published opinion omits parts of the lengthy unpublished opinion are indicated by asterisks.

with a witness. His co-defendant, Velma Cooper, appeals from her conviction of obstructing the due administration of justice. We conclude that the defendants were properly charged under both 18 U.S.C. §§ 1503 and 1512, that § 1503 is applicable to obstruction of the administration of justice by attempts to influence witnesses and has not been superseded in this regard by § 1512, and that the evidence was sufficient to support their convictions. We therefore affirm on all counts.

• • • • • •

I.

Finally, Wesley argues that his convictions under both 18 U.S.C. § 1503 (obstruction of justice) and 18 U.S.C. § 1512 (threatening a witness) are multiplicitous and violative of the double jeopardy clause of the fifth amendment. He contends that, because Cheryl Berry was a potential witness and § 1512 explicitly proscribes threats against potential witnesses, he can be convicted only of violating § 1512, but not for obstructing the due administration of justice. This argument ignores the plain words of the statute and misinterprets the legislative history behind § 1512.

Before 1982, 18 U.S.C. § 1503[1] was entitled "Influencing or injuring officer, juror or witness generally," and it prohibited influencing or intimidating, "any witness ... grand or petit juror, or [court] officer" in the discharge of his duty. The section also contained a residual clause prohibiting anyone from obstructing or attempting to obstruct the "due administration of justice." In 1982, Congress amended § 1503, and removed all references to witnesses.[2] At the same time, it also enacted 18 U.S.C.

1. The pre-1982 version of 18 U.S.C. § 1503 provided as follows:

> Whoever corruptly, or by threats of force, or by any threatening letter of communication, endeavors to influence, intimidate, or impede any witness in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force or by any threatening letter of communication, influences, obstructs or impedes, or endeavors to influence, obstruct or impede, the due administration of justice shall be fined not more than $5,000 or imprisoned not more than five years, or both.

2. 18 U.S.C. § 1503 now provides as follows:

> Whoever corruptly, or by threats of force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats of force, or by any threatening letter of communication, influences, obstructs or impedes, or endeavors to influence, obstruct or impede, the due administration of justice shall be fined not more than $5,000 or imprisoned not more than five years, or both.

§ 1512 which focuses solely on the protection of witnesses, informants and crime victims from intimidation.[3] The safeguards afforded by § 1512 are both more extensive and more detailed than those given by § 1503. Congress did not, however, remove the residual clause of § 1503 in its 1982 amendments.

[1, 2] The Second Circuit in *United States v. Hernandez*,[4] found that, "Congress affirmatively intended to remove witnesses entirely from the scope of § 1503,"[5] and held that witness intimidation could be prosecuted only under § 1512 and not § 1503. The court compared the language of the pre-1982 and post-1982 versions of § 1503, and determined that any other conclusion would "defy common sense" and "run contrary to the legislative history of § 1512."[6]

We disagree. By enacting § 1512 to address certain kinds of witness intimidation, and simultaneously deleting from § 1503 all references to witnesses, we find no indication that Congress intended that threats against witnesses would fall exclusively under § 1512 and were exempt from prosecution under § 1503. The facts of this case provide a graphic example of the soundness of this conclusion. Count III of the indictment charges Wesley with obstructing justice in violation of § 1503, "by urging and advising" Cheryl Berry to testify falsely. If urging a witness to commit perjury is not prohibited by § 1512, and if witnesses have been removed entirely from the scope of § 1503, then the conduct with which Wesley is charged would violate neither section. There is simply no indication that, by enacting § 1512 to broaden the

3. 18 U.S.C. § 1512 provides in pertinent part:

(a) Whoever knowingly uses intimidation or physical force, or threatens another person or attempts to do so, or engages in misleading conduct toward another person with intent to—

(1) influence the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(E) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $25,000 or imprisoned not more than ten years, or both.

(b) Whoever intentionally harasses another person and thereby hinders, delays, prevents or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined not more than $25,000 or imprisoned not more than one year, or both.

4. 730 F.2d 895 (2nd Cir.1984).

5. *Id.* at 899.

6. *Id.*

protection afforded witnesses, Congress intended to create such a gap in the statutory protection already available under § 1503.

This circuit has previously recognized the continued scope of § 1503 in *United States v. Vesich*,[7] in which the court upheld a conviction under the residual clause of § 1503 for advising a witness to perjure himself. The opinion applied the pre-1982 version of § 1503 in reaching its decision, but it particularly noted that, although the 1982 amendments "deleted all references to 'witness' in section 1503 and replaced them with separate statutory provisions," section 1512 "did not alter the 'due administration' clause of section 1503."[8] The opinion further noted that, "[w]e have defined the term 'administration of justice' as including or consisting of 'the performance of acts required by law in the discharge of duties such as appearing as a witness and giving truthful testimony when subpoenaed.'"[9]

Similarly, the district court in *United States v. Beatty*,[10] although bound by *Hernandez*, reached the same conclusion as the court in *Vesich*. In *Beatty*, the defendant was charged with "urging, suggesting and instructing witnesses to give false and misleading testimony before the grand jury and [with] giving disguised and misleading handwriting exemplars in response to orders of the grand jury in violation of 18 U.S.C. § 1503."[11] Citing *Hernandez*, the defendant argued that his conduct violated only § 1512, and that the count of the indictment charging him with violating § 1503 should be dismissed.

The court rejected this argument, relying primarily on the legislative history of § 1512. The court concluded:

> [i]t is clear that Congress intended to broaden the protection of witnesses by enacting § 1512. That is not to say, however that it intended to diminish the scope of § 1503 insofar as it aimed at preventing obstruction of justice. . . . It is interesting to note in this regard that § 1512 contains no reference to impeding or obstructing the due administration of justice.[12]

We recognize that Congress ultimately enacted the House version of § 1512, whose history is different from that of the Senate bill, referred to in *Beatty*. Nonetheless, based on the words of the statute, which appear to be clear, we endorse the result reached in *Beatty*. Therefore, we find that Wesley was properly charged with both obstruction of justice under § 1503 and with intimidating a witness under § 1512. For the same reason, we also find the conviction of Cooper under § 1503 not to be beyond the reach of that section.

For these reasons, the decision of the district court is AFFIRMED.

7. 724 F.2d 451 (5th Cir.), *petition for reh'g denied*, 726 F.2d 169 (1984).

8. *Id.* at 453-54 n. 1.

9. *Id.*, *quoting United States v. Howard*, 569 F.2d 1331, 1334 n. 4 (5th Cir.), *cert. denied*, 439 U.S. 834, 99 S.Ct. 116, 58 L.Ed.2d 130 (1978), *quoting United States v. Partin*, 522 F.2d 621, 641 (5th Cir.), *cert. denied*, 434 U.S. 903, 98 S.Ct. 299, 54 L.Ed.2d 189 (1977).

10. 587 F.Supp. 1325 (E.D.N.Y.1984).

11. *Id.* at 1329.

12. *Id.* at 1333.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

d States of America vs

DEFENDANT: OSCAR WESLEY

United States District Court

MIDDLE/LOUISIANA

DOCKET NO. 83-74-B CR 107

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL: In the presence of the attorney for the government the defendant appeared in person on this date — MONTH 4 DAY 6 YR 8

___ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

XX WITH COUNSEL J. Michael McDonald (Name of Counsel)

PLEA: ___ GUILTY, and the court being satisfied that there is a factual basis for the plea ___ NOLO CONTENDERE XX NOT GUILTY

DISTRICT COURT
FILED APR 6 1984
C. LEE DUPUIS CLERK

FINDING & JUDGMENT: There being a finding/verdict of ___ NOT GUILTY. Defendant is discharged / XX GUILTY

Defendant has been convicted as charged of the offense(s) of 18 USC 1202(a)(1)(Appendix) - possession of a firearm by a convicted felon; 18 USC 1503 - influencing a witness; 18 USC 1512(a)(1) and 2 - tampering with a witness.

The defendant orally advises the Court that he will appeal his conviction, and will file a written notice of appeal with the Court.

For the reasons read in the record, the Court denies defendant's motion for a new trial, and for a judgment of acquittal.

SENTENCE OR PROBATION ORDER: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

OF TWO (2) YEARS ON COUNT I.
IT IS FURTHER ORDERED AND ADJUDGED THAT THE DEFENDANT BE COMMITTED TO THE CUSTODY OF THE ATTORNEY GENERAL FOR A PERIOD OF FIVE (5) YEARS ON COUNT III TO RUN CONSECUTIVELY WITH THE SENTENCED IMPOSED ON COUNT I.
IT IS FURTHER ORDERED AND ADJUDGED THAT IMPOSITION OF SENTENCE, AS TO IMPRISONMENT ONLY, IS SUSPENDED, AND THE DEFENDANT IS PLACED ON PROBATION FOR A PERIOD OF FIVE (5) YEARS ON COUNT IV TO COMMENCE UPON THE DEFENDANT RELEASE FROM CUSTODY.
THE GOVERNMENT SHALL FILE WITH THE COURT WITHIN 30 DAYS ANY CLAIMS DUE THE VICTIMS. THE DEFENDANT SHALL HAVE 30 DAYS TO FILE OBJECTIONS OR AGREE AS TO THE CLAIMS ASSERTED BY THE GOVERNMENT. COPIES OF THESE DOCUMENTS SHALL BE FILED WITH THE PROBATION OFFICE. THE COURT SHALL DETERMINE THE AMOUNT DUE WITH OR WITHOUT A HEARING.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION: In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION: The court orders commitment to the custody of the Attorney General and recommends

NOTICE RECEIVED TO: McDonald Laurence
DATE 4/6/84 U.S. Marshal
Deputy Marshal

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

ORDER

U.S. District Judge

U.S. Magistrate

ORIGINAL

Supreme Court, U.S.
FILED
APR 30 1985
ALEXANDER L. STEVAS

Nos. 84-6156 and 84-5249

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

VELMA P. COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

OSCAR W. WESLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause bars cumulative punishment at a single trial for separate convictions under 18 U.S.C. 1503 and 18 U.S.C. 1512.

2. Whether the crime of advising a witness to lie in an official proceeding must be prosecuted only under 18 U.S.C. 1512 instead of 18 U.S.C. 1503.

3. Whether the evidence was sufficient to sustain the convictions.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-6156

VELMA P. COOPER, PETITIONER

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-18) 1/ is reported at 748 F.2d 962.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1984. The petition for a writ of certiorari in No. 84-6156 was filed on January 24, 1985; the petition in No. 84-6249 was filed on February 1, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Louisiana, petitioner Wesley was

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1/ "Pet. App." refers to the supplemental appendix to the petition for a writ of certiorari in No. 84-6156, which contains the full text of the court of appeals' opinion. Pursuant to Rule 47.5 of the Fifth Circuit, portions of the opinion that have no precedential value are not published and, accordingly, only excerpts appear at 748 F.2d 962.

convicted of possession in commerce of a firearm by a convicted felon, in violation of 18 U.S.C. App. 1202(a)(1) (Count 1); obstructing justice in violation of 18 U.S.C. 1503 (Count 3); and tampering with a witness, in violation of 18 U.S.C. 1512 (Count 4). Petitioner Cooper was convicted of obstructing justice in violation of 18 U.S.C. 1503. Petitioner Wesley was sentenced to consecutive prison terms of two years on Count 1, five years on Count 3, and five years suspended on Count 4. Petitioner Cooper was sentenced to a suspended five-year prison term.

1. The evidence, as summarized by the court of appeals (Pet. App. 2-3), is as follows. Petitioner Wesley pawned a .38 caliber revolver at the Airline Pawnshop in Baton Rouge, Louisiana and signed the receipt for the gun. After he was arrested on the charge of possession in commerce of a firearm by a convicted felon, Wesley claimed that the pawned pistol belonged to his former step-daughter, Cheryl Berry, and that he signed the receipt at the pawnshop owner's request because Berry was a minor.

Following his arrest, Wesley called petitioner Cooper, his living companion. After receiving the call, Cooper went unannounced to Berry's house and urged Berry to attend Wesley's bail hearing and corroborate his story. In response, Berry said that Wesley's story was false and that she would not attend the hearing. Cooper then told her (Pet. App. 2-3), "I just only telling you * * * what Oscar said * * * [and] Oscar said if you don't go, that he would be out there to talk to you." Berry thought that petitioner Cooper was trying to scare her and she considered Cooper's statement to be a threat.

Rather than attend the bail hearing, Berry stayed at home with the doors locked. Angry that Berry was absent from the hearing, petitioner Cooper told a friend (Pet. App. 3), "the little bitch <u>will</u> testify that it is her gun." About one week after his arrest, petitioner Wesley was released on bail. The

following day he drove slowly past Berry's house honking his horn.

2. The court of appeals affirmed (Pet. App. 1-18). It rejected Wesley's challenges to the sufficiency of the evidence on the firearms and witness tampering charges. The court also rejected the contention that the events involving Berry should have been prosecuted only under 18 U.S.C. 1512. In so ruling, the court recognized that when Section 1512 was enacted in 1982, Section 1503 was amended to delete all references to witnesses; nevertheless, the applicable portion of Section 1503 -- the residual clause proscribing obstruction of justice -- was unchanged and remains applicable to petitioners' conduct.

ARGUMENT

1. Both petitioners contend (84-6156 Pet. 2-4; 84-6249 Pet. 7-8) that their prosecution under Sections 1503 and 1512 violate the Double Jeopardy Clause. 2/ This contention lacks merit.

In a multi-count single trial, the Double Jeopardy Clause bars only cumulative punishment in excess of the limits prescribed by the legislature. Ohio v. Johnson, No. 83-904 (June 11, 1984) slip. op. 6. Under the established standards, it is clear that Congress intended cumulative punishment for separate convictions under Sections 1503 and 1512(a). First, the statutes list separate offenses under separate penalty schemes. See Albernaz v. United States, 450 U.S. 333, 336 (1981). Second, each offense requires proof of an element that the other does not. United States v. Woodward, No. 83-1947 (January 7, 1985). Section 1503 requires proof of the existence of a pending judicial proceeding known to the violator. See Pettibone v. United States, 148 U.S. 197, 205-207 (1893); United States v. Vesich, 724 F.2d 451, 454 (5th Cir.), on rehearing, 726 F.2d 168 (1984); United States v. Johnson, 605 F.2d 729, 730 (4th Cir.

2/ Since Cooper was acquitted on the Section 1512 charge, her judgment of conviction would be unaffected by the resolution of this issue.

1979), cert. denied, 444 U.S. 1020 (1980). Section 1512 contains no similar requirement. On the other hand, Section 1512(a) requires proof that the violator either intimidated, threatened or used physical force or misleading conduct towards another person. Section 1503 does not require this element. Thus, cumulative punishment is authorized at a single trial for separate convictions stemming from one transaction under these statutes. See United States v. Wilson, 565 F. Supp. 1416, 1433 (S.D.N.Y. 1983).

2. Petitioners also contend (84-6156 Pet. 3; 84-6249 Pet. 9-12) that their convictions under Section 1503 were improper because Section 1512 preempts all prosecutions for witness tampering. This contention is without merit.

Prior to its amendment in 1982, Section 1503 read as follows (underlined portions were deleted in 1982):

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States Commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States Commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more that $5,000 or imprisoned not more than five years, or both.

In cases decided under that statute, the courts consistently recognized that a request to a witness to testify falsely in

official proceedings constituted obstruction of justice within the Section's residual clause. See, e.g., United States v. Vesich, 724 F.2d 451, 455-456 (5th Cir. 1984); United States v. Friedland, 660 F.2d 919, 930 (3d Cir. 1981), cert. denied, 456 U.S. 989 (1982); United States v. Johnson, 605 F.2d 729, 730 (4th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); Falk v. United States, 370 F.2d 472, 475-476 (9th Cir. 1966), cert. denied, 387 U.S. 926 (1967).

When the Victim and Witness Protection Act, 18 U.S.C. 1512, was enacted, 3/ Congress deleted all references to witnesses from Section 1503. Congress did not, however, alter the residual clause of Section 1503 in any way. When Congress amends part of a statute but leaves another part intact, the two provisions are given "as full a play as possible." Markham v. Cabell, 326 U.S. 404, 411 (1945). Thus, by leaving the residual clause of Section 1503 untouched, Congress in effect ratified the judicial interpretations of that clause that reached the conduct of asking a witness to lie in official proceedings. This construction is reasonable because Sections 1503 and 1512 are directed at different goals: Section 1503 guards against the corruption of judicial proceedings (by whatever method) whereas Section 1512 protects witnesses.

Contrary to petitioners' contention (84-6156 Pet. 3; 84-6249 Pet. 9), it is not clear that the decision below conflicts with the decision of the Second Circuit in United States v. Hernandez,

---

3/ Section 1512 provides in pertinent part:

> (a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person with intent to-
>
> (1) influence the testimony of any person in an official proceeding;
>
> * * *
>
> Shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

730 F.2d 895 (1984). In Hernandez, the defendant was convicted of threatening a witness in order to obtain documentary evidence, in violation of Section 1503. The court of appeals vacated his conviction under Section 1503 but there is some ambiguity in its opinion. The court states at one point that Congress "intended to remove witnesses entirely from the scope of § 1503" (730 F.2d at 898) and elsewhere in its opinion that "Congress intended that intimidation and harrassment of witnesses should thenceforth be prosecuted under § 1512 and no longer fall under § 1503" (id. at 899). Since the facts in Hernandez involved intimidation, the court's narrower statement is its holding. Accordingly, not until the Second Circuit has occasion to consider the issue in a case where a witness is asked to lie -- without intimidation or harrassment -- will its full reading of the relevant statutes be known. See United States v. Beatty, 587 F. Supp. 1325 (E.D.N.Y. 1984) (permitting prosecution under Section 1503 for urging witnesses to give false testimony to grand jury and for providing misleading handwriting samples to grand jury); United States v. King, 597 F. Supp. 1228 (W.D.N.Y. 1984) (asking informant to lie to authorities does not violate Section 1512).

In the meantime, the parameters of any potential conflict among the circuits remain hazy; indeed, the conflict may well be resolved as the lower courts have further experience with the legislation passed in 1982. See e.g. United States v. Lester, 749 F.2d 1288 (9th Cir. 1984).

3. Petitioners also contend (84-6156 Pet. 3; 84-6249 Pet. 13-18) that their convictions are not supported by the evidence. These factbound questions do not merit further review.

The jury had ample evidence from which to conclude that petitioner Cooper urged Berry to lie at petitioner Wesley's bail hearing. Although Cooper contends that all she did was tell Berry to tell the truth, the jury reasonably could have concluded that Cooper's insistence that Berry corroborate Wesley's story after Berry said it was untrue was intended to encourage Berry to

testify falsely. Similarly without merit are Wesley's arguments (84-6249 Pet. 13-15): (1) that he could not have threatened Berry because he was incarcerated, and (2) that Cooper did not threaten Berry as evidenced by the jury's acquittal of her on that charge. Wesley could properly be convicted as an aider and abettor to the threat despite his incarceration when the crime occurred. United States v. Garrett, 720 F.2d 705, 713 (D.C. Cir. 1983), cert. denied, No. 83-6067 (Feb. 21, 1984); United States v. Molina, 581 F.2d 56, 61 & n.8 (2d Cir. 1978). His conviction is unaffected by the jury's acquittal of Cooper. See United States v. Powell, No. 83-1307 (Dec. 10, 1984); Standefer v. United States, 447 U.S. 10 (1980); Dotterweich v. United States, 320 U.S. 277 (1943). 4/

4. Petitioner Wesley also contends (84-6249 Pet. 16-18) that the evidence fails to support his conviction for possession of a firearm by a felon. As the court of appeals stated (Pet. App. 5-7) the evidence showed that R.G. Industries manufactured the pistol in Miami, Florida, in 1974 and then shipped it to Jackson, Mississippi. The pistol was a "firearm" because it was designed to expel a projectile by an explosive. The pawnshop owner examined the pistol when Wesley pawned it and determined that it was working properly. Although the pawnshop owner erroneously copied the serial number of the pistol as "0054616" instead of "Q054616", a Bureau of Alcohol, Tobacco and Firearms agent examined the pistol pawned by Wesley and determined that the tail of the "Q" was worn and resembled an "O" (Tr. 71-72, 96). These facts, taken in the light most favorable to the government, Glasser v. United States, 315 U.S. 60 (1942), amply established that petitioner Wesley, a prior felon, possessed a firearm that had been in interstate commerce.

4/ The jury might have determined that Cooper failed to understand fully that her message to Berry was a threat, but that Wesley understood its full meaning. Accordingly, the jury's verdicts are consistent.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

THOMAS E. BOOTH
Attorney

APRIL 1985

SUPREME COURT OF THE UNITED STATES

(5)

VELMA P. COOPER

84-6156

v.

UNITED STATES

OSCAR W. WESLEY

84-6249 (4)

v.

UNITED STATES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 84-6156 AND 84-6249. Decided May 28, 1985

The petitions for writs of certiorari are denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Before 1982, 18 U. S. C. §1503 prohibited influencing or intimidating "any witness in any court of the United States," or any juror or court officer in the discharge of his or her duty. The section also contained a residual clause forbidding anyone from obstructing or attempting to obstruct the "due administration of justice." In 1982, Congress amended §1503 to remove all references to witnesses. At the same time, it enacted the Victim and Witness Protection Act, 15 U. S. C. §1512, addressed specifically to protecting witnesses, informants and crime victims from harassment and intimidation. Congress did not, however, remove from §1503 the residual "obstruction of justice" clause.

Petitioners in these cases were charged with violating both §1503 and §1512 by attempting to influence a witness to testify falsely. They argued that such conduct could no longer support a conviction under §1503, because §1512 was now the only statute covering witness tampering. The Court of Appeals for the Fifth Circuit rejected this contention and affirmed petitioners' convictions under §1503, rea-

soning that certain kinds of witness tampering could still be reached under the provision's "obstruction of justice" clause. 748 F. 2d 962 (1984). The court observed that § 1512 did not proscribe "urging and advising" a witness to testify falsely, which was the conduct that was charged to have violated § 1503 in this case. If urging a witness to commit perjury was not prohibited by § 1512, and if witnesses had been removed entirely from the scope of § 1503, the conduct with which petitioners were charged would violate neither section. The Court of Appeals saw no indication that in enacting § 1512 to broaden witness protection, Congress had intended to create such a gap.

In reaching this result, the Court of Appeals explicitly rejected the reasoning of *United States* v. *Hernandez*, 730 F. 2d 895 (CA2 1984). In that case, the Second Circuit vacated a conviction under § 1503 that was based on witness intimidation. Reviewing the language and legislative history of §§ 1503 and 1512, the court held that Congress "affirmatively intended to remove witnesses entirely from the scope of § 1503." *Id.*, at 898. The argument that the residual clause of that statute still covered witness harassment, the court stated, "def[ied] common sense." *Id.*, at 899.

The Courts of Appeals of two large circuits have thus arrived at contrary interpretations of an important criminal statute. I would grant certiorari in these cases to resolve the conflict.